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In the

Supreme Court of the United States

October Term, 2002

J. Brown, Joint Tenant Trustee,

Petitioner,

v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, BOARD OF APPEALS; THE TAX CLAIM BUREAU; EDWARD W. GILLESPIE, TRAPPE BOROUGH TAX COLLECTOR; and COUNTY OF MONTGOMERY RECORDER OF DEEDS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1 Whether federal question or civil rights jurisdiction exists for a Joint Tenant Trustee to enforce substantive contract rights where state and local actors are alleged to be depriving him/her of his/her freedom of contract and/or taking private property under terms of a private trust contract in violation of the Fifth Amendment, applicable to the states under the incorporation doctrine which states, in part, that "no person shall be.... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" ?

2. Whether the substantive due process rights to a federal cause of action under the Bill of Rights brought pursuant to 42 U.S.C. §§ 1981, 1983 held by a Joint Tenant Trustee of an executory "private trust" *agreement to convey* which does not evidence *"an executed conveyance of an interest in real property to a 'person' other than the grantor"*, create an exception to the jurisdictional limitations of the Tax Injunction Act ?

3. Whether a Joint Tenant Trustee held subject to an executory declaration of trust contract that allegedly abridges the statutory right to tax due to prohibitions embodied in the federal constitution has a federal right of redress under the Constitution and statutes of the United States ?

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IN THE SUPREME COURT OF THE UNITED STATES
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J. Brown, Joint Tenant Trustee,

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v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, BOARD OF APPEALS; THE TAX CLAIM BUREAU; EDWARD W. GILLESPIE, TRAPPE BOROUGH TAX COLLECTOR; and COUNTY OF MONTGOMERY RECORDER OF DEEDS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. Brown, Joint Tenant Trustee (with the right of survivorship) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in *Kepoint Preservation Trust Org. v. Fisher*, No. 01-3708 (3rd.Cir. July 3, 2002) is unreported. The various opinions of the United States District Court for the Eastern District of Pennsylvania are unreported in this case.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 3, 2002. A timely petition for rehearing was filed, and the requested rehearing was denied on August 19, 2002. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The district courts have federal question jurisdiction codified at 28 U.S.C. § 1331 and concurrent civil rights jurisdiction under 28 U.S.C. § 1343(a) as amended by Pub.L. 96-170, Section 3. The note set out in a footnote under 28 U.S.C. § 1343(a) is applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after December 29, 1979. Accordingly, this Honorable Court has subject matter jurisdiction over the declaration of trust contract, real parties in interest thereto, and Respondents.

The Fifth Amendment to the United States Constitution, states in part, "no person shall be.... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation". The Thirteenth Amendment to the United States Constitution, states in part, "involuntary servitude shall exist within the United States, or any place subject to their jurisdiction". The Fourteenth Amendment to the United States Constitution, states in part, "All persons born... in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

STATEMENT OF THE CASE

A. The jurisdiction of this Honorable Court is based on the federal guarantee of Economic Substantive Due Process due Petitioner Brown, and similarly situated individuals.

By affidavit on February 24, 1997, the original transferor voluntarily and irrevocably gave up his right, title, and interest in certain "property", in trust, to the creator/trustor as a straw party mediator to facilitate the simultaneous re-assignment of legal title only to Joint Tenant Trustees. The named holders of beneficial interest have no control over the Board of Trustees or disbursement of "property" in any form and their interest is non-transferrable, during or after their lifetime. The Trustees obligation is to conduct the affairs of this intrust estate under terms of an executory declaration of trust until the time of delivery of expectant rights to all "property" due the beneficiaries. The original transferor has no due process remedy available to him because he relinguished all right, title, and interest in the property prior to the alleged contractual impairment. Petitioner Brown contends that the power of the state to legislate is not in question here, but state and local actors within the jurisdiction of the United States hold *a want of power to tax* the document in dispute. This is because the declaration of trust to which Petitioner Brown is held subject, taken in entirety, evidences an "inter vivos, *agreement to convey which is executory in nature with mutual promissory obligations*" and does not evidence *"an executed conveyance of an interest in real property to a 'person' (individual, corporation, or association) other than the grantor"*. These words used in statutory construction are limited to their well established technical meanings as defined under federal law. This "private trust" ascended on day one as an organization that cannot be arbitrarily forced

by state and local actors, absent certain facts, to descend to the level of an "association" as defined for public purposes under federal law.

The fundamental question in this case is whether a citizen serving in his official capacity of a Joint Tenant Trustee under private declaration of trust contract *holds* a substantive civil right to a hearing in federal court based under 28 U.S.C. § 1331 or 28 U.S.C. § 1343(a) to enforce terms of trust obligation. This case involves the alleged deprivation of substantive, federal rights, privileges, and immunities by *both* state and local actors. Petitioner Brown's complaint is intended to advance the two types of substantive due process whereby the deprivation is wrong "on its face".

B. Proceedings Below

On September 8, 1999, Petitioner Brown, in his official capacity as a Joint Tenant Trustee, initiated a civil rights suit in the U.S. District Court for the Eastern District of Pennsylvania. Petitioner Brown's complaint alleged that action of state officials and local actors were responsible for the deprivation of his federal constitutional rights, privileges, and immunities. (1a-10a) Petitioner Brown's complaint was dismissed for lack of jurisdiction on December 22, 2000 regarding the *state* defendants because the Eleventh Amendment and/or the provisions of the Tax Injunction Act protected them. (11a-14a) On September 18, 2001, upon consideration of Petitioner Brown's Motion for Reconsideration of the Court's Order of December 22, it was ordered that his Motion was denied. (15a-16a) On September 18, 2001, it was ordered that Petitioner Brown's Motion for Summary Judgment was denied, and Defendant's Cross Motion For Summary Judgment was Granted. The order also stated, Petitioner Brown's remaining § 1983 claim against a *local* actor, Mr. Gillespie, the Tax Collector for the

Borough of Trappe, is likewise barred by the Eleventh Amendment and/or the Tax Injunction Act. *Appellee Gillespie's Cross Motion For Summary Judgment was granted upon the declaration of trust while simultaneously dismissing Petitioner Brown's complaint for "lack of jurisdiction"* (*emphasis added*). (18a-20a)

On October 2, 2001, a notice of appeal was mistakenly filed naming "Kepoint Preservation Trust" as the Petitioner. In actuality, it was timely filed by J. Brown, Joint Tenant Trustee, as the person who filed the complaint with the fiduciary duty and right to do so. The complaint was filed pursuant to terms of the private declaration trust document that is merely *entitled* "Kepoint Preservation Trust". An amended notice of appeal was timely filed on October 15, 2001, correctly naming J. Brown, Joint Tenant Trustee as the Appellant. The circuit court order issued on February 1, 2002, affirmed the Clerk's orders of November 19 and November 29, 2001, stating Petitioner Brown could prosecute the appeal pro se while the issue of representation will be submitted to the merits panel for review, and to proceed with briefing as outlined in the aforementioned order. (21a-23a) On July 3, 2002, the United States Court of Appeals for the Third Circuit Petitioner denied Petitioner Brown's motion to file a supplemental brief as moot because his complaint was dismissed for "essentially the same reasons given by the district court in granting the defendants motion". The circuit court ordered and adjudged the judgment of the district court against "Kepoint Preservation Trust" entered September 20, 2002 be affirmed. (24a-29a) Petitioner Brown contends that the "document" in dispute did not convey an interest in realty to a '*person*', as statutorily defined, upon which judgment can attach. On August 19, 2002, the circuit court denied the Petition for Rehearing submitted by Petitioner Brown. (30a-31a) In a letter dated August 26, 2002 stating the policy of the involved decision makers, Mr. Douglas A. Gifford, Esquire,

advised Petitioner Brown that 2002 was "the last year that the Tax Claim Bureau will voluntarily remove the property from the sale". (32a-33a)

REASONS FOR GRANTING THE PETITION

I. Substantive due process clauses protect the individual's right to make and enforce private trust contracts that abridge the right to tax

"Freedom of contract" is "a basic and fundamental right reserved to the people", protected and guaranteed by the Fifth Amendment to the Constitution as applied to "state action" under the Fourteenth Amendment. The Fifth Amendment specifically prohibits the "deprivation of liberty without due process of law" and "nor shall private property be taken for public use, without just compensation." U.S.Const.amends. 5, 14. The fundamental right of certain individuals to "make and enforce" private trust contracts is antecedent to the creation of the State. This substantive right was made "equal" to all citizens pursuant the Thirteenth Amendment and correlative remedial statutes were provided by Congress at 42 U.S.C. §§ 1981, 1983 etc. As such, Petitioner Brown's federal cause of action arises as a substantive right pursuant to the Bill of Rights. U.S.Const.amends. 1, 5, 7, 14. Petitioner Brown's joint, possessory, contractual rights and duties can be contra-distinguished by the contract terms and conditions from non-fundamental or state-created statutory "rights" stemming from "personal property ownership".

As this Honorable Court held in *Coolidge v. Long*, 282 U.S. 582, 595, 51 S.Ct. 306, 75 L.Ed. 562 (1930), a voluntary, *inter vivos* declaration of trust among private individuals only, is a contract within the meaning of the Federal Constitution. The subject matter of the instant suit is an executory trust document as distinguished from a

document evidencing an "executed conveyance". The purpose of the instant lawsuit is to enforce Petitioner Brown's right/obligation of contract and protect underlying contract rights based on the federal question jurisdictional statute at 28 U.S.C. § 1331 and the civil rights jurisdictional statute at 28 U.S.C. § 1343(a).

In support of his cause of action, Petitioner Brown prays for relief based on the following: The first eight amendments to the Federal Constitution set forth self-executing prohibitions on governmental action. The United States Supreme Court has had primary authority to interpret their effect. The Constitution's Fourteenth Amendment, as enacted, confers substantive rights against the states that, like the provisions of the Bill of Rights are self executing. The power to interpret the Constitution in a case or controversy remains in the federal judiciary. *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The doctrine of dual sovereignty apparently put no limit on the power of federal courts to vindicate and enforce the Federal Constitution against state action of any type that violated it.

Petitioner Brown's cause of action arises directly under the United States Constitution and statutes of the United States because the right of contract is an "inalienable" right reserved to the people. *See, e.g., Frisbie v. United States*, 157 U.S. 160, 165, 15 S.Ct. 586, 39 L.Ed. 657 (1895). This Honorable Court's articulation of the liberty of contract in *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897) gave the *Allgeyer* case its special significance in the development of substantive due process. The right to contract about one's affairs is part of the liberty of the individual protected by the Fifth and Fourteenth Amendments, and this is settled law under the decisions of this Court and is no longer open to question. U.S.Const.amends. 5, 14. *Adkins v. Children's Hospital*, 261 U.S. 525, 545, 43 S.Ct. 394, 67 L.Ed 785 (1923); *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 33

L.Ed.2d 548 (1972). "Liberty [of contract] implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community", as held in *West Coast Hotel v. Parrish*, 300 U.S. 379, 392, 57 S.Ct. 578, 81 L.Ed. 703 (1937). In light of these guiding principles, nothing is more important than a means of enforcement to an obligation of contract.

This Honorable Court held in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542-552, 92 S.Ct. 143, 31 L.Ed.2d 172 (1972), and cases cited, with respect to jurisdiction under 28 U.S.C. § 1343(a)(3) and its jurisdictional counterpart 42 U.S.C. § 1983, that:

> the Civil Rights Act of 1866 guaranteed "broad and sweeping ...protection" to basic civil rights. The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. *Monroe*, supra, at 171; *Hague*, supra, at 509-510. It cannot be doubted, that, included in the right of personal liberty and the right of private property intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property". *Id.* at 544. The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. *Id.* at 552.

Petitioner Brown's complaint met the first requirement for an action under 1983 whereby he alleged that (1) some person has deprived him of a Federal right; and (2) that the person who deprived him of that right acted under color of State law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

This Honorable Court held in *Murray v. City of Charleston*, 96 U.S. 432 at 444, 24 L.Ed. 760 (1877), that,

> the power [to tax] is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no State shall pass a law impairing the obligations of a contract..... The constitutional provision against impairing contract obligations is a limitation upon taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition". *Murray*, 96 U.S. at 444. "Such limitations of the power of State taxation we have heretofore recognized. *We have held property in one stage of its ownership not to be taxable, and in a succeeding stage to be taxable*".

Id. at 446 (*emphisis added*).

This Court concluded in striking down the South Carolina statute in *Murray* that:

> there is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts and it is one of the highest duties of this court to take care that the prohibition shall neither be evaded or frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered

> society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed.

Id. at 448-49.

In 1915, this Honorable Court held in *Coppage v. Kansas*, 236 U.S. 1, 15, 35 S.Ct. 240, 59 L.Ed. 441(1915), citing *St. Louis S. W. Ry. v. Arkansas*, 235 U.S. 350, and many specific cases cited in *St. Louis* at page 362, that:

> When a party appeals to this court for protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court.

Id. at 15.

In 1930, this Honorable Court held in *Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562 (1930) that:

> It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of a litigant under a prior contract, or *whether the State is depriving his property without due process of law in violation of the Fourteenth Amendment and the question turns on the existence or terms of a contract, this*

> *court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect.*

Id. at 597 (*emphasis added*).

Here, the interests and contractual rights of the real parties in interest under the trust document are so determined and vested that the interference with them by Pennsylvania officers and local actors impairs the obligation of the contract embodied in the property covenant; therefore, it necessarily follows that such interference deprives the original transferor of his property without due process and wrongfully impairs the obligation held by Petitioner Brown. Unless the transfer tax can be sustained as an excise, it must fail altogether. The vital question is as to when the transfer or succession to the property takes place because the transfer is the subject of taxing authority *held* by state actors and and the resulting "personal property ownership" is the subject of taxing authority *held* by local actors. *See, e.g., Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562 (1930) (striking down a similar but not identical "excise" privilege tax dispute).

In *Berryman v. Board of Trustees*, 222 U.S. 334, 32 S.Ct. 147, 56 L.Ed. 225 (1912):

> the contest was over the contract, and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The Court had jurisdiction of the parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by state action within the right guaranteed by the Federal Constitution. This adjudication

> necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank.

Id. at 347.

The *Berryman* Court held that the right to tax may be abridged by contract that may not be impaired without violating the Federal Constitution. It carries with it, the power and duty to protect contract right for the purpose which is to be measured by value of the right to be protected, not by the value of some mere element of that right, such as the tax for a single year. Here, Petitioner Brown contends that the making of the "private trust document" in dispute, foreclosed the right to collect any and all forms of taxation concerning which the contract affords immunity to the real parties in interest due to federal constitutional prohibitions.

This Honorable Court has historically affirmed the principle that "contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them". *Allied Structual Steel Co., v. Spannus*, 438 U.S. 234, 246, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). This principle has been applied time and time again by the Court and should be similarly applied to the case at bar. This case is within the limited class of cases which require federal equity adjudication because the contract terms and allegedly illegal "state action" must be interpreted in compliance with Federal law.

This Honorable Court acknowledged in *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1972), that we recognized in *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)(quoting *Ex*

Parte Virginia, 100 U.S. 339, 346, 25 L.Ed. 676 (1880), the following principle:

> when federal claims are premised on [1983]-as they are here-we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect fundamental or constitutional rights

Id. at 501. The Court went on to say that:

> the very purpose of 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.

Id. at 503-504

Petitioner Brown respectfully submits the proposition that he is entitled to an immediate federal court intervention, interpretation and adjudication as a matter of substantive due process guaranteed by federal law. This proposition is based upon certain vested duties and correlating rights, privileges, and immunities under the governing substantive law (the trust document and the United States Constitution and statutes). The right to follow a lawful calling or occupation is a property interest protected by due process clause. U.S.Const. Amends. 5, 14. *See Green v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959). Petitioner Brown contends his calling to enter a contract to serve in the capacity as a Joint Tenant Trustee, with others, constitutes such a lawful calling. Petitioner Brown's cause of

action is likewise, a property interest protected by due process clauses. U.S.Const.amends. 5, 14. *See, for example, Schneider v. U.S.*, 27 F.3d 1327, certiorari denied, 513 U.S. 1077, 115 S.Ct. 723, 130 L.Ed.2d 628 (1994).

The Due Process Clauses are the source of three kinds of constitutional protections. First, it incorporates specific protections defined in the Bill of Rights. *See, e.g., Gideon v. Wainwright*, 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)(criminal defendant guaranteed the assistence of counsel under the Sixth Amendment as applied through the due process clause of the Fourteenth Amendment). Second, the "substantive due process" which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them". *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), citing *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Pittsley v. Warish*, 927 F.2d 3, 6, (1st. Cir. 1991). The third type is a procedural due process claim which is fundamentally different. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)(STEVENS J. concurring in judgment). Id. at 331, 337-338 including footnotes.

Petitioner Brown's complaint is specifically intended to advance the first two constitutional types of claims whereby the wrongful deprivation of either "liberty" or "privately *held* property" is unconstitutional "on its face". Petitioner Brown's right to a federal hearing for his cause of action arises because (1) the Fifth amendment of the Bill of Rights as applied to the States under the Fourteenth Amendment guarantees federal protection to individual rights vested under express contracts, as citizens, that private property shall not be taken for public use without just compensation and that no person will be deprived of life, liberty or property without due process of law (2) the substantive component of the Fifth Amendment Due Process Clause bars certain arbitrary, wrongful government actions

exceeding constitutional limitations "regardless of the fairness of the procedures used to implement them". *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). As to these two types of claims, the constitutional violation actionable under 1983 is complete when the wrongful action is taken. *Id.* at 338. (STEVENS, J. concurring in judgments). The decision in *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), upheld the interpretation of § 1983 that a plaintiff may invoke § 1983 regardless of any state-tort remedy that may be available to compensate him for the deprivation of these [fundamental] rights, as articulated in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (overruled in part) by *Monell v. New York City*, 436 U.S. 658, 664-689, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The right to contract in relation to privately *held* property is such a fundamental right.

As applicable here, Justice Peckham, writing for the Court in *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) said:

> It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power...The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.

Id. at 56. The Court went on to say:

> it is a question of which two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract.

Lochner at 58.

The same limitations are placed upon administrative agencies of the State as are applicable to the direct action of the State. U.S.Const.amend. 14. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *Smith v. Alwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Likewise, the same limitations are placed upon local governing bodies (and local officials sued in their official capacities), and therefore, they can be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, *as here*, the action that is alleged to be unconstitutional may fairly be said to represent official policy. *Monell v. New York City*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Id.* at 690-691. In our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for all whom all government exists and acts. *Yick Wo v. Hopkins*, 118 U.S. 369, 6 S.Ct. 1064, 30 L.Ed. 220, (1886). Accordingly, Petitioner Brown's fundamental and substantive due process rights are not similarly situated with those descending to the level of non-fundamental, "natural rights" stemming from ownership of personal property.

II. The Tax Injunction Act does not apply when the *inter vivos* trust agreement does not evidence an executed conveyance, and property right is *held* in expectancy as distinguished from possession (ownership).

Petitioner Brown's contractual obligation arose pursuant to terms and conditions of trust that *hold* private property subject to "*an executory, declaration of trust agreement to convey realty, with mutual promissory obligations* that does not evidence "*an executed conveyance of an interest in real property to a 'person' other than the grantor*". This class of document can be distinguished from a "document" evidencing an "executed conveyance", or taxable transaction as defined for public purposes. This class of "document" is not subject to tax within the jurisdiction of the United States. To do so would simultaneously violate the substantive Due Process Clauses of the Federal Constitution and correlating federal constitutional rights, privileges, and immunities *held* by real parties in interest to this private trust document. As such, the real parties in interest to the trust document in dispute are not similarly situated with any "person" in the nationwide class of "real property owners" or State "taxpayers". The terms "joint tenancy" and "private trust" are excluded from the statutory definition of "association".

There has never been a case directly on point regarding this issue. The relief sought from this Honorable Court is based upon substantive federal constitutional rights of the Petitioner and not upon a privilege conferred by state law. The instant case does not involve an issue of whether state officials are conforming their conduct to a purely discretionary state law that would preclude this Court from enjoining any action by Respondents under principles of comity, federalism or other basic principles concerning

equitable relief. The nature of this dispute is fundamentally distinguishable from that of dissatisfied taxables or "real property owners" whose cause of action arises under uniformity clauses.

Because no one has the natural right to own property or to transfer it to others upon death, personal, "real property ownership rights" arise to a 'person' from the exercise of a state-granted privilege of transmission conferred by law. The State, as their sovereign, may tax the owner for either the privilege of claiming "personal property ownership" or transmission of personal ownership rights to another 'person'. *United States v. Perkins*, 163 U.S. 625, 628, 165 S.Ct. 1073, 41 L.Ed. 287 (1895). A "real property owner" subject to tax, or "taxpayer", has a statutorily created procedural "right" to a cause of action severely limited to those which arise under constitutional uniformity clauses. Owners "rights" in relation to the property include a statutory "right of appeal" derived from the State, as sovereign, from the initial exercise of a state-granted privilege. Rights derived from state-created privileges are considered mostly non-fundamental, or procedural in nature, because they do not arise directly under the substantive prohibitions or limitations of the Federal Constitution in contrast to Petitioner Brown's. With respect to such non-fundamental or state-created 'rights' held by real property owners, the Court has suggested that the Constitution may provide protection, but the protection afforded by the Due Process Clause is largely "procedural".

The equal right *held* by individual citizens to make, enter, and enforce contracts are derived from the source who created inalienable rights, not conferred as a privilege under state law. The real parties in interest to the declaration of trust to which Petitioner Brown has the duty to enforce, exercised their right to do so. The right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. *Kaiser Aetna v.*

United States, 444 U.S. 164, 176 (1979). The rights, privileges, and immunities in question here, exists apart from state authority. When the transaction embodied in a document of this nature is mislabled or mis-classified as an executed conveyance and a tax is wrongfully imposed upon any real party(ies) in interest to it, an instant substantive federal cause of action arises in constitutional tort. Therefore, the substantive due process clause in conjunction with the "Contracts Clause" which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them" and as such, any state remedy in such a case is irrelevant. *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Pittsley v. Warish*, 927 F.2d 3 (1st. Cir. 1991).

The litigants in *Fair Assessment Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), and *California v. Grace Brethren Church*, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1992), were undisputedly "real property owners", or State "taxpayers". In *McNary* this Honorable Court held that "taxpayers are barred by the principle of comity from asserting 1983 actions against the validity of state tax systems in federal courts." *McNary*, 454 U.S. at 116, 102 S.Ct. at 186. Still, the *McNary* Court emphasized that the state remedies must be "plain, adequate, and complete" which tracks the "plain, speedy and efficient" language of the Tax Injunction Act of 28 U.S.C. S 1341. Indeed, many post-*McNary* decisions provide declaratory and injunctive relief for plaintiffs against state officials for violations that did not directly involve the enjoining of the tax collection process. *See, e.g., Marigold Foods, Inc v. Redalen,* 834 F. Supp. 1163, 1165-66 (D. Minn. 1993) (preliminary injunction issued; whether state "premium" was a tax was a federal question and the label given to the tax is not dispositive of the court's inquiry as to whether the Tax

Injunction Act is applicable); *Smith v. Travis County Education District*, 791 F. Supp. 1170, 1190-1203 (W.D. Tex. 1992) (Tax Injunction Act did not prevent district court from asserting jurisdiction to enjoin collection of unconstitutional tax; however, the court found that an injunction should not be issued for other reasons).

The Pennsylvania tax appeal procedure provides an inadequate remedy under these circumstances that makes the Tax Injunction Act inapplicable to the suit *sub judice*. The district court and court of appeals misconstrued the Act as a bar to federal jurisdiction even though this action, strictly speaking, focuses on the misclassification by the Respondent state officials of the subject trust document as an "executed conveyance" to a "person" or "taxpayer" which is not explicitly the enjoining of tax collection. *Cf. Hoohuli v. Aryoshi*, 741 F2d. 1169, 1176-77 (9th Cir. 1984) (Tax Injunction Act not applicable to Hawaiian tax spending regulation). Such mislabeling affecting the status of persons within the class of protected contractual rights in this case clearly violates the spirit of the Contracts Clause and the Due Process Clause of the Fourteenth Amendment as discussed in the *Murray* and *Coolidge* tax cases. The right to a hearing for a litigant under the due process clauses does not depend on certain success. U.S.Const.amends. 5, 14. *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252 (1978).

In *USX Corp. v. Pennsylvania Dept. of Labor and Industry*, 643 F.Supp. 1567 (M.D. Pa. 1986), the court held that a constitutional challenge to the statutory authorization to pay unemployment compensation upon an initial determination of eligibility and the lack of an adequate scheme of recouping payments did not interfere with the collection of unemployment tax. *Id.* at 1570-71. Consequently, the plaintiffs' challenge did not violate the Tax Injunction Act and the suit was allowed to proceed. *Id.* Likewise, Appellant Brown is not attempting to challenge

the constitutionality of any "valid tax *under* state law", nor will the outcome of the instant litigation impact the tax system or collection of *valid* tax revenues of a state or municipality. Quite the contrary, this lawsuit is extremely focused on the Respondents specific actions to illegally tax the "private trust" document in contravention of the spirit of the "Contract Clause" of the U.S. Constitution, the express economic substantive provisions of the Bill of Rights, as well as Pennsylvania law. The courts of the Commonwealth of PA do not have complete or adequate subject matter jurisdiction to make a determination applicable to all state or local actors within the jurisdiction of the United States in the event the Trustees voted to sell one "property" and purchase "another" in a different State.

Black's Law Dictionary 7th Ed. (1999), at page 1474, defines the word "taxpayer" as "one who pays or is subject to a tax", neither of which exist in this case. Here, the procedural remedy afforded in contesting being labeled a "taxpayer" under Pennsylvania law is so uncertain and speculative that it is not a bar to federal jurisdiction under the Tax Injunction Act. The Pennsylvania tax appeal process presumes that the affidavit of trust executed a "transfer of interest in property to a 'person' other than the grantor" and is more focused upon the amount of tax assessment and the fairness of the underlying valuation that represents the uniform basis for the tax rather than the allegedly illegal levy. See, e.g., *Behe v. Board of Assessment Appeals*, 952 F.2d 71 (3rd Cir. 1991) (addressing how Pennsylvania has remedial statutes as to assessments of real property). The Department of Revenue makes the initial determination and assessment of transfer tax. A "petition" for statutory appeal in the Commonwealth of PA is defined under 61 Pa. Code § 7.1 as an application by a "taxpayer". The Respondent whom the "taxpayer" must "petition", is the Board of Appeals, part of the same Department of Revenue which imposed the tax. The Board of Finance and Revenue and the

Board of appeals are merely administrative, non-judicial entities that lack the authority of a judicial tribunal and is "inadequate" for the substantive due process rights of Petitioner Brown, as mandated by *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981). Likewise, the personal property assessment procedures only apply to the year in dispute and occur annually, requiring multiplicy of suits in different forums.

Under such circumstances, the procedural remedies offered by Pennsylvania law fail to allow any meaningful, permanent remedy that would release the Joint Tenant Trustees from the illegally imposed obligation. *Cf. Rochester& Pittsburgh Coal Co. v. Board of Assessment & Revision of Taxes*, 438 Pa. 506, 266 A.2d 78, 79 (1970) (plaintiff *taxpayers* may raise federal constitutional claims in Pennsylvania state courts so long as they first appeal to the appropriate state agency). The Pennsylvania appellate courts also limit civil rights remedies under 42 U.S.C. 1983, especially as it pertains to awarding money damages. *See, Murtagh v. Berks County Board of Assessment Appeals*, 715 A.2d 548 (Pa. Comwth. 1998). Moreover, the procedural remedies provided under Pennsylvania law for injured individuals and entities regarding tax assessments are primarily administrative and not judicial. Finally, Petitioner Brown may not have a substantive "right to a jury trial" in a state court civil action under the Seventh Amendment or under the Due Process Clause of Fourteenth Amendment, especially if the State has not waived sovereign immunity in regard to state agencies. U.S.Const.amends. 7, 14. *Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden Co.*, 284 U.S. 151, 52 S.Ct. 69, 76 L.Ed. 214 (1931). Therefore, the district courts have federal question jurisdiction codified at 28 U.S.C. § 1331 and/or civil rights jurisdiction under 28 U.S.C. § 1343(a) as amended, to hear the constitutional issue concerning the right to contract.

III. The questions presented are important

This Honorable Court should hear this important issue at bar concerning the right to contract because the decision of the United States Court of Appeals for the Third Circuit in this case conflicts with the spirit and principles embodied in relevant decisions of this Court concerning substantive due process. Compare *Kepoint Preservation Trust Org. v. Fisher*, No. 01-3708 (3rd Cir. July 3, 2002) with *Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562 (1930) and *United States v. Perkins*, 163 U.S. 625, 626, 628-30 (1895). *See also* S.Ct. Rule 10(c).

As this Honorable Court held in *Coppage v. Kansas*, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441(1915):

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune....Since it is self-evident that, unless all things are held in common, some persons must have more property than others. It is, from the nature of things, impossible to uphold freedom of contract and the right to private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights... The Fourteenth Amendment recognizes "liberty" and "property" as co-existent human rights and debars the States from any unwarrented interference with either.

Id. at 17.

The mere desire to equalize taxation cannot justify a burden on something not within congressional power.

Nichols v. Coolidge, 274 U.S. 531, 540, 47 S.Ct. 531, 71 L.Ed. 1184 (1927). The same principle is clearly applicable as well to state and local actors who attempt to impose state taxing power upon a private class of document for which they are prohibited. Here, the petition *sub judice* raises significant constitutional issues regarding state and local actors who illegally mis-label a person(s) or entity as "taxpayer", in the absence of an "executed conveyance". This acts to the detriment of underlying basic federal constitutional rights to *dispose, hold, and acquire property* by contract as protected under the Fifth and Fourteenth Amendment. A federal district court is under an equitable duty to assert subject matter jurisdiction in civil rights actions where an asserted substantive federal right to contract and *hold* private property *might* otherwise be lost. *Tully v. Griffin, Inc.*, 429 U.S. 68, 97 S.Ct. 219, 50 L.Ed.2d 277 (1976)(*emphasis added*). The individuals to the document in dispute herein have exercised the contractual privilege of their birthright to do so.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the district court because "[t]he Tax Injunction Act bar both injunctive and declaratory relief, *California v. Grace Brethren Church*, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1992), while, the 'free-standing principle of comity' bars damages. *Wright v. Pappas*, 256 F.3d 635, 637 (7th Cir. 2001)". *Kepoint Preservation Trust Org. v. Fisher*, No. 01-3708, slip op. at 4. The Third Circuit's decision clearly conflicts with the substantive due process case law of this Honorable Court in this "limited class" of cases and, thus, S.Ct. Rule 10(c) suggests that this Court must consider taking this appeal to correct this errant decision by the court of appeals below. In *Coolidge v. Long*, this Honorable Court reaffirmed that it is well understood that where the question of whether state actors are depriving a litigant of a federal right, privilege, or immunity turns on the existence or terms of a trust contract,

this Court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. This Court's independent jurisdiction is not impeded by the intent of the Tax Injunction Act. Statutes are intended to provide protection for the lawful exercise of individual rights.

The Third Circuit failed to recognize this Honorable Court's well-established principles propounded in *Murray*, *Coolidge* and other cases referenced herein, that the right to contract is sacred in our constitutional system and, thus, Article III jurisdiction must attach when a litigant seeks to vindicate and validate these rights. Moreover, the Tax Injunction Act and this Honorable Court's holding in *McNary* do not act as a jurisdictional bar insofar as Petitioner Brown has an absolute right, under the right to contract, to contest the mis-characterization of the declaration of trust document as a "business trust association" or State taxpayer, under federal law by Pennsylvania state and local actors. Accordingly, due to the constitutional import of the questions sought to be reviewed, this Honorable Court should grant the petition.

CONCLUSION

The petition for a writ of certiori should be granted.

Respectfully submitted,

J. Brown, Joint Tenant Trustee
371 W. Main St.
Trappe, Pensylvania (19426)
(610) 489-3913

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEPOINT PRESERVATION TRUST, ORG. :

By and Through

J. Brown, Joint Tenant Trustee :
:
Plaintiffs :
:
vs. :
:
D. Michael Fisher, Individual :
:
COMMONWEALTH OF PA :
C/o Hon. D. Michael Fisher, :
Attorney General :
:
COMMONWEALTH OF PA :
DEPARTMENT OF REVENUE :
BUREAU OF INDIVIDUAL TAXES :
:
COMMONWEALTH OF PA :
BOARD OF FINANCE AND REVENUE :
:
COMMONWEALTH OF PA :
DEPARTMENT OF REVENUE :
BOARD OF APPEALS :
:
THE TAX CLAIM BUREAU :

COURT HOUSE :
:
EDWARD W GILLESPIE :

TRAPPE BORO TAX COLLECTOR :
and :
COUNTY OF MONTGOMERY :

RECORDER OF DEEDS :

Civil Action No. _____

COMPLAINT

JURY TRIAL DEMANDED

INTRODUCTION

Plaintiff, KEPOINT PRESERVATION TRUST ORG. is an independent entity created and arising through a private straw party Declaration of Trust agreement. By and through its Board of Trustees, as real parties in fiduciary interest and pure obligor's under trust contract, Plaintiff complains of defendants and shows the court the following:

This complaint prays for redress and remedy in the form of all monetary, declaratory, and injunctive relief. Plaintiff seeks a redress of grievances for the unconstitutional action by state officials resulting in injury to persons and property in constitutional tort due to the deprivation of the rights to "life, "liberty", and "property", in this case as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

Defendants violate the Fourteenth Amendment of the U.S. Constitution by depriving Plaintiff and components of the Plaintiff the right and liberty to contract. Specifically, Defendants continue to interfere with the right and liberty inherent with the formulation of the Plaintiff's Declaration of trust. All illegal actions on the part of Defendants deprive

Plaintiff of rights, privileges, and/or immunities, secured and guaranteed by the Constitution and laws to all persons within the jurisdiction of the United States, resulting in the illegal conversion of privately held property to public use.

Plaintiff also sues the Defendants directly under 42 U.S.C.A. § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Finally, Plaintiff sues the Defendants for blatantly violating the tax laws of the Commonwealth of Pennsylvania through this Honorable Court's ancillary jurisdiction.

I. JURISDICTION

ALLEGATION-CLAIM ARISING UNDER PROVISION OF THE FEDERAL CONSTITUTION

1. This action involves federal question jurisdiction pursuant to 28 U.S.C.A. § 1331. This is a claim for monetary, declaratory, and/or injunctive relief arising under the Constitution of the United States, Article I, Section 10, prohibiting the states, or state officials under color of state law, from unlawful impairment, invasion, denying, obstructing or interference of federally protected fundamental rights held under private Declaration of Trust contract, beyond the authority granted Defendants by valid statute. Defendants actions under color of law, absent authority and jurisdiction, result in the illegal "conversion of privately held property to public use", and the impairment of contract obligations, and is therefore a violation of the U.S. Constitution, causing injury to persons and property in constitutional tort.

2. Congress has determined that there should be a private federal cause of action in tort for such violations under 42 U.S.C.A., Section 1983. Relief can be granted without impleading the state because of the officer's lack of delegated power. Therefore, the "Eleventh Amendment provides no shield for a state official confronted by a claim that he has deprived another of a federal right under color of law", as in this case.

3. This court has original jurisdiction to uphold Federal jurisdiction by reason of Title 28, Unites States Code, Section 1343(a)(3) and (4) and/or section 1331 to enjoin claimed illegality in the actions of state officers in their official capacity where it appears "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" and that such officers, and not the state, are the real parties defendant, and that a judgement for the plaintiff will not operate to control state action or to subject the state to liability, as in this case.

4. Jurisdiction is further predicated upon the identity of the parties, the "persona capacities" in which they sue or are sued, and the Petitioner's claim of systematic constitutionally protected rights violations by individuals acting as state officials.

5. Plaintiff's Claim that actions by Defendants "converted privately held property to public use" absent statutory authority in violation of the rights held by all real parties in interest, arises under Amendments V, IX, X, and XIV, Section 1 to the Constitution of the United States, all as more fully set forth below.

PARTIES (Plaintiff)

6. Plaintiff, KEPOINT PRESERVATION TRUST ORG. C/O 371 W. Main St., Box C, Trappe, Pennsylvania, (19426) was created and ascended on day one as an independent, unincorporated, private inter vivos trust organization through a straw party trustee/trustor Declaration of Trust security agreement as a matter of right under the Constitution of the United States, not under the laws passed by any of the several (State and Congress) legislatures. Plaintiff, J. Brown, Joint Tenant Trustee is in a fiduciary capacity only.

PARTIES (Defendants)

7. Defendants, known and unknown State Officials listed below, are named in an individual capacity in relation to their decisions and actions.

a) Commonwealth of Pennsylvania, COMMONWEALTH OF PA,C/o Hon. D. Michael Fisher, Attorney General, 15th Floor-Strawberry Square, Harrisburg, Pennsylvania (17120)

b) D. Michael Fisher, an adult individual, with the only known address of 15th Floor-Strawberry Square, Harrisburg, Pennsylvania (17120)

c) COMMONWEALTH OF PA, DEPARTMENT OF REVENUE, BUREAU OF INDIVIDUAL TAXES, DEPT. 280603, Harrisburg, PA (17120)

d) COMMONWEALTH OF PA, BOARD OF FINANCE AND REVENUE, 132 Finance Building, Harrisburg, Pennsylvania (17120)

e) COMMONWEALTH OF PA, DEPARTMENT OF REVENUE, BOARD OF APPEALS, Harrisburg, Pennsylvania (17128-1021)

f) THE TAX CLAIM BUREAU, COURT HOUSE, P.O. Box 311, Norristown, Pennsylvania, (19404-0311)

g) EDWARD W GILLESPIE, TRAPPE BORO TAX COLLECTOR, 525 MAIN STREET-BORO HALL, Trappe, Pennsylvania (19426)

h) COUNTY OF MONTGOMERY, RECORDER OF DEEDS, P.O. Box 0311, Norristown, Pennsylvania (19404-0311)

IV. FACTS SETTING FORTH CLAIM FOR RELIEF

8. The Declaration of Trust security agreement to which KEPOINT PRESERVATION TRUST ORG. arose, is a document which the COMMONWEALTH OF PA is prohibited from taxing under the Constitution and laws of the United States.

9. The Declaration of Trust security agreement to which KEPOINT PRESERVATION TRUST ORG. arose, and persons and property held subject thereto as a matter of right under non-code state law, are impliedly excluded from the well established technical meanings of the words used in establishing valid statutory authority, exposing the Defendants' lack of jurisdiction in this case.

10. On May 15, 1997, the COMMONWEALTH OF PA, DEPARTMENT OF REVENUE, BUREAU OF INDIVIDUAL TAXES, under color of law, issued a

DECISION AND ORDER to impose Realty Transfer Tax upon KEPOINT PRESERVATION TRUST ORG., a decision officially adopted and promulgated by Defendants.

11. Said ORDER is an illegal claim of right to property held subject under Declaration of Trust to which KEPOINT PRESERVATION TRUST ORG. arose.

12. EDWARD W GILLESPIE, TRAPPE BORO TAX COLLECTOR, under color of law, sent illegal tax notices demanding payment threat, duress & coercion.

13. Defendants COMMONWEALTH OF PA, DEPARTMENT OF REVENUE, BUREAU OF INDIVIDUAL TAXES and EDWARD W GILLESPIE, TRAPPE BORO TAX COLLECTOR created invalid levies and instituted unconstitutional garnishment proceedings including liens upon intrust property.

14. Systematic actions by all Defendants impaired the obligations of contract embodied in the Declaration of Trust to which KEPOINT PRESERVATION TRUST ORG. arose, to the detriment, invasion, and violation of the constitutionally protected rights held by complaintants.

15. Defendants actions resulted in the illegal conversion of privately held property to public use.

16. Plaintiff hereby challenges the jurisdiction of Defendants under legislative authority to illegally tax Plaintiff's property.

COUNT I (INTERFERENCE RIGHT TO CONTRACT)

17. Paragraphs 1 through 16 hereof are incorporated by

reference as if more fully set forth herein.

18. Defendants' actions impede on the constitutional right to contract guaranteed by the Contract Clause of Article I, § 10 ("No state shall...pass only... Law impairing the Obligation of Contracts") as well as the Fourteenth Amendment of the U.S Constitution.

19. Any act(s) by which responsible State and county officers and/or the agents, servants, and employees under them fail to comply with his/her oath of office and statutory provisions authorizing, imposing, and limiting taxing power within the State of Pennsylvania is an illegal proceeding is that:

a. necessarily arbitrary;

b. against public policy;

c. a breach of such duty and obligation;

d. repugnant to the order of the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania.

WHEREFORE, Plaintiff demand judgment against all Defendants for money damages, injunctive relief enjoining Defendants' illegal taxation of Plaintiff's property and all other relief that this Court deems equitable and just.

COUNT II (CIVIL RIGHTS VIOLATION)

20. Paragraphs 1 through 19 hereof are incorporated by reference as if fully set forth herein.

21. Defendants, by and through their concerted efforts

to tax Plaintiff, outside the scope of the Pennsylvania statute, illegally interfere with the right to contract as guaranteed by the Fourteenth Amendment of the U.S. Constitution.

WHEREFORE, Plaintiff prays this Honorable Court enter declaratory relief that:

a.) any attempt to enforce such illegal acts by the use of the name of the state, under color of state law, is void, unconstitutional;

b) in conflict with the superior authority of said Constitutions and he/she is in that case stripped of his official or representative character and is subjected in his person to the consequences of his/her individual conduct;

c) the wrongful act did not have to be done with specific intent to impair the obligation of contact causing the deprivation of a state or federal constitutional right to the injury of real parties in interest; and

d) that actual and punitive damages, reasonable attorney's fees and costs be ordered to be paid by the Defendants and that other appropriate relief be ordered as this court deems equitable and just.

COUNT III (VIOLATION OF TAX STATUTE)

22. Paragraphs 1 through 21 hereof are incorporated by reference as if fully set forth herein.

23. Defendants, jointly and severally, are illegally taxing

persons and/or property held subject to said Declarations of trust without the appropriate statutory authority, namely, 72 Pa.C.S.A. § 1101 *et seq*.

WHEREFORE, Plaintiff prays that this Honorable Court enjoin any past or present tax liability assessed by the Defendants, jointly and severally, and that this Honorable Court order other relief as may be equitable and just.

Respectfully submitted,

_____

J. Brown, Joint Tenant
Trustee for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEPOINT PRESERVATION
TRUST ORGANIZATION

CIVIL ACTION

v.

NO. 00-4564

D. MICHAEL FISHER, ET AL

ORDER

AND NOW, this 22nd day of December, 2000, upon consideration of the Motion to Dismiss (Docket #16) by defendants D. Michael Fisher, the Commonwealth of Pennsylvania, the Department of Revenue of the Commonwealth of Pennsylvania, the Board of Finance and Revenue of the Commonwealth of Pennsylvania, and the Board of Appeals of the Department of Revenue of the Commonwealth of Pennsylvania ("the state defendants"), and the plaintiff's Response thereto, IT IS HEREBY ORDERED that the Motion is GRANTED.

The reasons for this decision are as follows.

The plaintiff's Complaint seeks monetary, declaratory, and injunctive relief for alleged violations of the federal Constitution (specifically, the right to contract under Art. I, §10 and the right to equal protection under the Fourteenth

Amendment), and of a Pennsylvania state statue.[1]

States and state agencies are shielded from federal suits by the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Hans v. State of Louisiana*, 134 U.S. 1, 15 (1890); *Cory v. White*, 457 U.S. 85, 91 (1982). *See also Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). Although a state may waive its Eleventh Amendment immunity and consent to be sued in federal court, Pennsylvania has explicity withheld such consent. *See* 42 Pa. C.S. § 8521(b); *Laskaris v. Thomburgh,* 661 F.2d 23, 25 (3d Cir. 1981). Congress also has the authority to abrogate Eleventh Amendment immunity, but doing so requires unmistakably clear language. *See Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). None of the statutes cited by the plaintiff meets this test, and the Supreme Court has expressly held that 42 U.S.C. § 1983 does not abrogate the Eleventh Amendment. *See Quern v. Jordan*, 440 U.S. 332, 341 (1979).

In response, the plaintiff concedes that the Commonwealth of Pennsylvania is not an appropriate defendant, but argues that the Eleventh Amendment does not protect state officials who violate a federal right under the color of state law.[2] *See* p. Resp. at 4. Even if the suit were to proceed

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[1] The plaintiff's Complaint and brief cite 72 Pa. C.S. § 1101 ct seq., and in particular, 72 Pa. C.S. § 1102-C.3. However, it appears that the plaintiff meant to cite § 1102-C.3 of the Realty Transfer Tax Act, which was eventually consolidated at 72 Pa. C.S. § 8102-C.3.

[2] The plaintiff also argues that the Tucker Act (28 U.S.C. § 1346(a)(2) is a waiver of Eleventh Amendment immunity in certain situations. The Tucker Act does authorize suits against the federal government, but it does

against the individual defendant Fisher, however, this Court would be barred from awarding any of the remedies sought by the plaintiff against Fisher or against any of the state defendants.

The Tax Injunction Act (28 U.S.C. §1341) explicitly bars federal courts from granting injunctive relief in cases involving state tax schemes where a "plain, speedy, and efficient" remedy is available under state law. *See Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). The plaintiff argues that the Tax Injunction Act does not bar § 1983 claims, and cites *Fulton Market Cold Storage Co. v. Cullerton*, 682 F.2d 1071 (7th Cir. 1978) and *North American Cold Storage Co. v. Cook County*, 468 F. Supp. 424 (N.D. Ill 1979), in support thereof. Both of these lower court cases permitted § 1983 actions for damages despite the prohibitions of § 1341, but they were later overruled by the Supreme Court in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 107 (1981) on the principle of federal-state comity.

The plaintiff also argues that there is no "plain, speedy, efficient, or even 'adequate remedy'" under state law due to Pennsylvania's "self imposed constitutional limitation upon entering the Union of the United States." *See* Pl. Resp. at 11. If that were so, then no state in this union would be deemed to have an acceptable remedy under the Tax Injunction Act. Surely Congress did not intend to create a law with no meaning.

As the state defendants argue, a "plain, speedy, and efficient" remedy is one that "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *See Rosewell*, 450 U.S. at 514. Pennsylvania law provides taxpayers with the

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not apply to suits against the states. *See* 28 U.S.C. §1346(a)(20).

opportunity to petition the Board of Finance and Revenue for a refund, 42 Pa. C.S. § 1104, and creates jurisdiction in the Commonwealth Court of appeals therefrom. *See* 42 Pa. C.S. § 763. Further appeals to the Pennsylvania Supreme Court are authorized, 42 Pa. C.S. § 723, and review is ultimately available in the United States Supreme Court, 28 U.S.C. § 1257. I find that this scheme constitutes a "full hearing and judicial determination" under *Rosewell*, 450 U.S. at 514, and that the Tax Injunction Act bars the injunctive relief sought by the plaintiff in this case.

Under *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) and *McNary,* 454 U.S. at 107, the plaintiff's claims for declaratory and monetary relief are also barred. I therefore dismiss the federal claims against the state defendants.

Pursuant to the Supreme Court's direction in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988), and *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966), I decline to assert jurisdiction over the remaining state law claim.

The state defendants are hereby dismissed from this action.

BY THE COURT:

_____

MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEPOINT PRESERVATION
TRUST ORGANIZATION
CIVIL ACTION

v.

NO. 00-4564

D. MICHAEL FISHER, ET AL

ORDER

AND NOW, this 18th day of September, 2001, upon consideration of Plaintiff's Motion for Reconsideration of the Court's Order of 12/22/00 (Docket #23), and Defendants' response thereto (Docket #24), IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED for the following reasons.

A motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e) is designed to "correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) *cert. denied* 476 U.S. 1171 (1986). Accordingly, such a motion may be made for one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has surfaced; or (3) there is a need to correct a clear error of law or to prevent manifest injustice. *See, e.g., Tischio v. Bontex, Inc.*, 16 F. Supp.2d 511, 532 (D.N.J. 1998); *Dodge v. Susquehanna Univ.*, 796 F. Supp. 829, 830 (M.D. Pa. 1992). A motion for reconsideration is not a tool to be used by litigants to reargue a motion, to present evidence or arguments that should have been raised in the first instance, or to take a

"second bite at the apple." *Tischio*, 16 F. Supp.2d at 532 (citations omitted). A party seeking reconsideration must show "more than a disagreement with the Court's decision, and recapitulation of the cases and arguments consideration by the court before rendering its original decision fails to carry the moving party's burden." *Id.* (citations and internal quotations omitted).

Plaintiff has not alleged that there has been a change in controlling law since the issuance of the Court's December 22, 2000 order, nor has plaintiff argued that new evidence relevent to the case has become available since that time. Plaintiff's sole argument is that the Court committed a clear error of law. However, in support of this motion, Plaintiff has simply rehashed and expounded upon the same arguments presented to the Court in their initial briefs. This "recapitulation" of Plaintiff's prior arguments is not sufficient to carry the burden required of a litigant seeking reconsideration of a Court's decision. For that reason, the Court will deny Plaintiff's motion.

BY THE COURT:

_____

MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEPOINT PRESERVATION
TRUST ORGANIZATION

CIVIL ACTION

v.

NO. 00-4564

D. MICHAEL FISHER, ET AL

ORDER

AND NOW, this 18th day of September, 2001, upon consideration of Plaintiff's Motion for Protective Order (Docket #26), and Defendants' response thereto (Docket #28), IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED as moot because the Court has, on today's date, issued an order granting summary judgment for Defendant and against Plaintiff.

BY THE COURT:

_____

MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEPOINT PRESERVATION
TRUST ORGANIZATION

CIVIL ACTION

v.

NO. 00-4564

D. MICHAEL FISHER, ET AL

ORDER

AND NOW, this 18th day of September, 2001, upon consideration of Plaintiff's Motion for Summary Judgment (Docket #30), defendant Edward Gillespie's Cross Motion for Summary Judgment (Docket #33), and all responses thereto, IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED and Defendant's Motion is GRANTED for the following reasons.

On December 22, 2000, the Court issued an order (Docket #21) dismissing the state defendants from this case because they were protected by the Eleventh Amendment and/or the provisions of the Tax Injunction Act. The remaining § 1983 claim against Mr. Gillespie, as Tax Collector for the Borough of Trappe, is likewise barred by application of these provisions. Therefore, the Court rules in favor of Mr. Gillespe and against Plaintiff for the reasons given in the December 22, 2000 order.

BY THE COURT:

_____

MARY A. McLAUGHLIN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEPOINT PRESERVATION
TRUST ORGANIZATION

CIVIL ACTION

v.

NO. 00-4564

D. MICHAEL FISHER, ET AL

CIVIL JUDGMENT

Before the Honorable Mary A. McLaughlin:

AND NOW, this 19th day of September, 2001, in accordance with the Court's Order of September 19, 2001,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Defendant and against Plaintiff.

BY THE COURT:

ATTEST:

Carol James
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 01-3708
Kepoint Preservation Trust v. Fisher

To: Clerk

1) Letter Dated November 26, 2001 Treated as a Motion to Supplement the Appellant's November 2, 2001 Submission and to Review the Clerk's November 19, 2001 Order

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The foregoing Motion to supplement the November 2, 2001 submission is granted. The Clerk's November 19, 2001 order referring the issue of representation of the Trust of the merits panel will be submitted to a panel for review. The Court may take any action it deems appropriate upon consideration of the matter.

The appellant's brief and the joint appendix shall be filed and served within twenty-one (21) days of the dated of the panel's order.

For the Court,

_____
Clerk

Dated: November 29, 2001
DMM/cc: Mr. J.M. Brown
Randall J. Henzes, Esq.
J. Bart DeLone, Esq.
Lawrence Sager, Esq.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 29, 2001
D-23

No. 01-3708

KEPOINT PRESERVATION TRUST & J. BROWN,
Appellants
vs.
FISHER, ET. AL.
(Eastern District Civil No. 00-cv-04564)(MAM)

Present: Nygaard, *Circuit Judge*

1) Clerk's Letter Dated October 16, 2001

2) Letter Dated November 2, 2001, from J. Brown in Response to Clerk's Letter Dated October 16, 2001.

3) Clerk's Order Dated November 19, 2001.

4) Letter Dated November 26, 2001, from J. Brown treated as a Motion to Supplement the November 2, 2001, submission and to review the Clerk's November 19, 2001, Order.

Dana Moore
Case Manager 267-299-4927

Copy of Clerk's 11/29/01 Order referring to panel

ORDER

The Clerk's order of November 29, 2001, has been reviewed and is affirmed. The issue of pro se representation of the Trust is referred to the merits panel. This matter may proceed with briefing as outlined in the aforementioned order.

It is so ordered.

By the Court,

Circuit Judge

DATED: February 1, 2002

DMM/cc: Mr. J. Brown

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-3708

KEPOINT PRESERVATION TRUST ORG., BY AND THROUGH J. BROWN, JOINT TENANT TRUSTEE

v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PA; COMMONWEALTH OF PA DEPARTMENT OF RENEVUE BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PA BOARD OF FINANCE AND REVENUE; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BOARD OF APPEALS; THE TAX CLAIM BUREAU COURT HOUSE; EDWARD W. GILLESPIE, TRAPPE BORO TAX COLLECTOR; COUNTY OF MONTGOMERY RECORDER OF DEEDS

Kepoint Preservation Trust Org.,

Appellant.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 00-cv-04564)
District Judge: Mary A. McLaughlin

Submitted Under Third Circuit LAR 34. I(a)
June 26, 2002
Before: SLOVITER, AMBRO AND ROSENN, CIRCUIT JUDGES
(Filed July 3, 2002)

OPINION

PER CURIAM

In September 2000 a civil rights complaint signed by "J. Brown, Joint Tenant Trustee for Plaintiff was filed in the United States District Court for the Eastern District of Pennsylvania on behalf of "Kepoint Preservation Trust Org.... an independent, unincorporated, private inter vivos trust organization" and "Plaintiff, J. Brown, Joint Tenant trustee." The complaint, which arose from the imposition of state transfer taxes following the transfer of real estate from an individual to the trust,[1] alleges that taxation of the trust violates both the Contracts Clause, U.S. Const. Art. I, § 10, cl. 1, and Pennsylvania law. The complaint seeks actual and punitive damages, along with injunctive and declaratory relief.

1. In May 1997 the Bureau of Individual Taxes of the Pennsylvania Department of Revenue made a determination of transfer tax due. In August 1997 Kepoing petitioned the Board of Appeals for redetermination. After the Board sustained the transfer tax deficiency, Kepoing filed an appeal with the Board of Finance and Revenue, which denied the appeal. Instead of appealing to the Commonwealth Court of Pennsylvania pursuant to 42 Pa. Cons. Stat. § 763, Kepoint filed an action in the Montgomery County Court of Common Pleas, which dismissed the action because the Commonwealth Court had exclusive jurisdiction.

I

The district court granted the defendants' motion to dismiss. The court concluded that the state and its agencies are protected from the action by the Eleventh Amendment because Pennsylvania has not waived its immunity, while the action against defendant Fisher in his individual capacity is barred by the Tax Injunction Act, 28 U.S.C. § 1341, which expressly bars federal courts from granting injunctive relief in cases involving tax schemes where a "plain, speedy, and efficient" remedy exists under state law. The court found that the system of review provided by 42 Pa. Cons. Stat. §§ 1104, 763 and 723 is such an avenue because it provides the taxpayer with a full hearing and judicial determination at which he could raise any and all constitutional objections to the tax as determination at which he could raise any and all constitutional objections to the tax as required by *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). The court concluded that the claims for declaratory and monetary relief were also barred by the Tax Injunction Act and declined to assert jurisdiction over the state law claim. The plaintiffs filed a motion for reconsideration, which was denied along with their outstanding motions. This timely appeal followed.

II

As an initial matter, we note that J. Brown is not an attorney who is a member of this Court's bar and thus may not represent a party other than himself. *Rowland v. California Men's Colony*, 506 U.S. 194 (1993). Mr. Brown filed an amended notice of appeal stating that he was appealing the district's court's judgment, but because it was unclear whether he also sought to represent Kepoint, the Clerk sent him a letter advising that, pursuant to *Rowland*, he may not represent Kepoint and that he should obtain counsel to represent Kepoint

on pain of dismissal. Mr. Brown responded to the Clerk, but has not obtained counsel to represent Kepoint. It is unclear from his response whether he is arguing that he should be allowed to represent the trust or is proceeding on his own behalf exclusively. To the extent that Kepoint is a party to the appeal, the appeal is dismissed as to it.

To the extent that Mr. Brown himself was a party to the action below and is an appellant here in his own right, we shall affirm the judgment of the district court for essentially the same reasons given by the district court in granting the defendants' motion. The Tax Injunction Act bars both injunctive and declaratory relief, *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982), while "the free-standing principle of comity" bars damages. *Wright v. Pappas*, 256 F.3d 635, 637 (7th Cir. 2001). Mr. Brown's motion to file a supplemental reply brief is denied as moot.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-3708

KEPOINT PRESERVATION TRUST ORG., BY AND THROUGH J. BROWN, JOINT TENANT TRUSTEE

v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PA; COMMONWEALTH OF PA DEPARTMENT OF RENEVUE BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PA BOARD OF FINANCE AND REVENUE; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BOARD OF APPEALS; THE TAX CLAIM BUREAU COURT HOUSE; EDWARD W. GILLESPIE, TRAPPE BORO TAX COLLECTOR; COUNTY OF MONTGOMERY RECORDER OF DEEDS

Kepoint Preservation Trust Org.,

Appellant.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 00-cv-04564)
District Judge: Mary A. McLaughlin

Submitted Under Third Circuit LAR 34. I(a)
June 26, 2002
Before: SLOVITER, AMBRO AND ROSENN, *CIRCUIT JUDGES*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here ORDERED AND ADJUDGED by this court that the judgment of the district court entered September 20, 2001, be and the same is hereby AFFIRMED. Costs taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

Chief Deputy Clerk

DATED: July 3, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 01-3708

KEPOINT PRESERVATION TRUST ORG., BY AND THROUGH J. BROWN, JOINT TENANT TRUSTEE

v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PA; COMMONWEALTH OF PA DEPARTMENT OF RENEVUE BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PA BOARD OF FINANCE AND REVENUE; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BOARD OF APPEALS; THE TAX CLAIM BUREAU COURT HOUSE; EDWARD W. GILLESPIE, TRAPPE BORO TAX COLLECTOR; COUNTY OF MONTGOMERY RECORDER OF DEEDS

Kepoint Preservation Trust Org.,

Appellant.

SUR PETITION FOR REHEARING

Presented: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES,

and ROSENN,* *Circuit Judges*

The petition for rehearing filed by Appellant, J. Brown, Joint Tenant Trustee, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,

Circuit Judge

Dated: *August 10, 2002*

DMM/cc: J.M, Brown
Randall J. Henzes, Esq.
J. Bart DeLone, Esq.
Lawrence Sager, Esq.

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* as to panel rehearing only.

(LETTER HEAD OF)
LAW OFFICES
CLEMENS, NULTY and GIFFORD

510 EAST BROAD STREET
POST OFFICE BOX 64439
SOUDERTON, PA 18964-0439
(215) 723-5533
FAX (215) 368-3343

August 26, 2002

Mr. J. Brown
371 W. Main St., Box C
Trappe, PA 19426

Re: Tax Sale

Dear Mr. Brown:

The Tax Claim Bureau has decided to remove the real property known as 371 W. Main St., Trappe, Pennsylvania from the Upset Tax Sale scheduled for September 23, 2002.

Be advised that this is the last year that the Tax Claim Bureau will voluntarily remove the property from the sale. This is not meant as any kind of threat, but rather as an advance answer to any such request you may make next year. This will provide you with one year to decide the best course of action, be it further efforts in court or payment of the taxes under protest or allowing the property to be sold. Continued non-payment of the taxes with no consequences is hardly fair to all the hard working individuals who struggle mightily every day to pay taxes. Nor activity, viz.: owning real estate of a similar nature.

I point this out not to engage in any kind of debate. It merely explains that I believe the Tax Claim Bureau has been more than fair in allowing you an opportunity to make your case as to the non-taxability of the real estate in question. I believe that you have pending a request for re-argument or argument before the court en banc, which I would imagine would be concluded prior to next year's tax sale.

Please guide yourself accordingly.

Very truly yours,

DOUGLAS A. GIFFORD

DAG:bak
cc: M. Elizabeth McBride, Deputy Treasure